Supreme Court, U.S.
FILED
AUG 29 2005
OFFICE OF THE CLERK

(5)

No. 04-52

IN THE

Supreme Court of the United States

BERTRAM RICE, Warden, et al.,

Petitioners,

v.

STEVEN MARTELL COLLINS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE STATES OF ARIZONA, COLORADO, CONNECTICUT, IDAHO, IOWA, MASSACHUSETTS, MICHIGAN, NEVADA, OHIO, OREGON, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, AND WASHINGTON IN SUPPORT OF THE PETITIONERS

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QUESTION PRESENTED

DOES 28 U.S.C. § 2254 ALLOW A FEDERAL HABEAS CORPUS COURT TO REJECT THE PRESUMPTION OF CORRECTNESS FOR STATE FACT-FINDING, AND CONDEMN A STATE ADJUDICATION AS AN UNREASONABLE DETERMINATION OF THE FACTS, WHERE A RATIONAL FACT-FINDER COULD HAVE DETERMINED THE FACTS AS DID THE STATE COURT?

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INTEREST OF AMICI

Amici States have a compelling obligation to protect the finality of judgments rendered in their criminal courts. The undoing of this finality in federal habeas corpus litigation undermines public safety, deterrence of crime, and effective rehabilitation; and the passage of time increases the risk of unfairness and inaccuracy in later re-trial of the criminal case. Additionally, under the doctrines of comity and federalism, Amici States have a compelling interest in their state court fact-findings and legal conclusions being protected from overreaching federal courts. Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress enacted reforms giving state court judgments their due deference while simultaneously strengthening the longstanding deference owed to state court factual findings. The decision from the Ninth Circuit Court of Appeals undermines both of these principles.

SUMMARY OF ARGUMENT

State court factual findings have long been clothed in this Court's presumption of correctness. Over the last 40 years, this presumption has expanded, both through the case law from this Court and from the passage of the Antiterrorism and Effective Death Penalty Act in 1996.

However, the passage of the AEDPA created two new sections of law dealing with state court factual determinations, 28 U.S.C. §§ 2254(d)(2) and (e)(1), which various Circuit Courts of Appeal have construed differently. Under the Fifth Circuit approach, a court first looks at the facts under 28 U.S.C. § 2254(e)(1) and then determines whether those facts are reasonable under 28 U.S.C. § 2254(d)(2). The Ninth Circuit takes the opposite approach, making a determination whether the ultimate decision is objectively reasonable. If the decision is not objectively reasonable then the state factual findings are not entitled to deference. Under the Third Circuit approach, a federal district approach can start with either prong, because the two

sections serve separate legal purposes. Amici believe the Third Circuit approach gives the proper deference to the concepts of comity and federalism that are an integral part of the federal habeas corpus jurisprudence, particularly the AEDPA, and when the current case is properly analyzed giving due weight to both 28 U.S.C. § 2254(d)(2) and to 28 U.S.C. § 2254(e)(1), then the decision from the Ninth Circuit cannot stand and must be reversed.

ARGUMENT

A. Evolution of Habeas Jurisprudence

This Court has long recognized that historical factual findings from state courts, as opposed to mixed questions of law and fact, are owed great weight in federal habeas corpus litigation. *Townsend v. Sain*, 372 U.S. 293 (1963). *Townsend* articulated six circumstances where an evidentiary hearing would not be necessary in federal court. *Id.* at 313. *Townsend* also made clear that while "the state court has reliably found the relevant facts, [the federal court should] defer to the its findings of law." *Id.* at 318 (brackets added). Congress responded to *Townsend* in 1966, inserting subsection (d) to 28 U.S.C. § 2254. The new 28 U.S.C. § 2254(d) included a modified version of the *Townsend* factors. *See* Pub. L. 89-711, § 2(d).[1] Following the 1966 amendment, 28 U.S.C. § 2254(d) read:

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the

[1] In 1973, this Court called *Townsend* "the precursor" to the 1966 amendments to 28 U.S.C. § 2254. *LaVallee v. Delle Rose*, 410 U.S. 690, 694 (1973) (per curiam).

> application for the writ and the State or an officer of or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—
>
> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the fact-finding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> (3) that the material facts were not adequately developed at the State court hearing;
>
> (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
>
> (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
>
> (6) that the applicant did not receive a full, fair and

adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record.[2]

After Congress enacted 28 U.S.C. § 2254(d) in 1966, this Court did not address this statutory provision for almost six years. The first time the statute was noted in an opinion, this Court concluded (with scant analysis) that an evidentiary hearing was required because facts had been inadequately developed in state court. *Boyd v. Dutton*, 405 U.S. 1, 3 (1972). A year after deciding *Boyd*, this Court for the first time reversed the granting of a writ of habeas corpus because the state court employed acceptable fact-finding under 28 U.S.C. § 2254(d). *LaVallee v. Delle Rose*, 410 U.S. 690, 695 (1973) (*per curiam*). *LaVallee* concluded that because the state court applied the correct legal standard in its analysis, the federal courts could assume the state court made

[2] This version of 28 U.S.C. § 2254(d) was in place 30 years later when Congress enacted the AEDPA.

unstated factual findings that supported its conclusion. *Id.* at 694.

The parameters of 28 U.S.C. § 2254(d) received no further Supreme Court interpretation until 1980.[3] That year, this Court reiterated the difference between "basic, primary, or historical facts" and the legal conclusions that could be drawn from them. Relying on *Townsend*, this Court held the former were entitled to deference pursuant to 28 U.S.C. § 2254(d), while the latter were not. *Cuyler v. Sullivan*, 446 U.S. 335, 341-42 (1980).

Four years later, this Court determined that both of the prongs for claims of ineffective assistance of counsel involve legal conclusions and not mere factual findings entitled to deference. *Strickland v. Washington*, 466 U.S. 668, 698 (1984). The next year, this Court held that the ultimate issue of whether a confession is voluntary involves a question of law not entitled to deference. *Miller v. Fenton*, 474 U.S. 104, 112 (1985).

A year after *Cuyler*, this Court emphatically stated that the "interest in federalism recognized by Congress in enacting 28 U.S.C. § 2254(d) requires deference by federal courts in factual determinations of all state courts." *Sumner v. Mata*, 449 U.S. 539, 547 (1981) (*Sumner I*). *Sumner I* also held:

> [I]t is clear that in adopting the 1966 amendment, Congress in § 2254(d) intended not only to minimize that inevitable friction [between federal and state courts] but also to establish that the findings made by the state-court system "shall be presumed to be correct" unless one of seven conditions

[3] It is true that 28 U.S.C. § 2254(d) was mentioned in other opinions. However, these cases provided no real analysis of 28 U.S.C. § 2254(d). *See, e.g., Brewer v. Williams*, 430 U.S. 387, 396-97 (1977) (merely noting that the federal district court relied on state record in reaching its decision).

> specifically set forth in § 2254(d) was found to exist by the federal habeas court. If none of those seven conditions was found to exist, or unless the habeas court concludes that the relevant state-court determination is not "fairly supported by the record," "the burden shall rest upon the applicant to establish *by convincing evidence* that the factual determinations by the State court was erroneous."

Id. at 550 (emphasis in original) (bracketed text added). To emphasize the point, *Sumner I* was revisited a year later, and, in a short, *per curiam* order, this Court held, "Only when one of seven specified factors is present or the federal court determines that the state-court finding of fact 'is not fairly supported in the record' may the presumption properly be viewed as inapplicable or rebutted." *Sumner v. Mata*, 455 U.S. 591, 592 (1982) (*per curiam*) (*Sumner II*).

A year after *Sumner II*, this Court further explained the contours of 28 U.S.C. § 2254(d) and the deference owed to state court factual findings. "This deference requires that a federal habeas court more than simply disagree with the state court before rejecting its factual determinations. Instead, it must conclude that the state court's findings lacked even 'fair support' in the record." *Marshall v. Lonberger*, 459 U.S. 422, 432 (1983) (internal punctuation omitted).[4] Citing *LaVallee*, *Marshall* also reiterated the principle that factual findings could be presumed based upon a state court's responsibility to follow the law. *Id.* at 433-34.

[4] Complementing *Marshall*, this Court subsequently held in another case that the Eleventh Circuit erred in substituting its own view of the facts for that of the Florida Supreme Court. *Wainwright v. Goode*, 464 U.S. 78, 86 (1983) (*per curiam*).

Marshall emphasized, "28 U.S.C. § 2254(d) gives federal habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them." 459 U.S. at 434.[5] Finally, *Marshall* noted, "We greatly doubt that Congress, when it used the language 'fairly supported by the record' considered 'as a whole' intended to authorize broader federal review of state court credibility determinations than are authorized in appeals within the federal system itself." *Id.* at 434-35.

Contemporaneously with *Marshall*, this Court found that a question of juror bias was entitled to deference. *Rushen v. Spain*, 464 U.S. 114, 120 (1983) (*per curiam*). The next year, *Rushen* was cited for the proposition that questions about a juror's perceptions about pre-trial publicity deserved similar deference. *Patton v. Yount*, 467 U.S. 1025, 1036-37 (1984). One term later, this Court found that a trial court's determination that a prospective juror could be excused for cause based on the juror's bias in rendering the death penalty also was similarly entitled to deference. *Wainwright v. Witt*, 469 U.S. 412, 429 (1985).

Likewise, when a person is charged with "felony murder," the state findings of culpability for the underlying felony are entitled to presumptions of correctness. *Cabana v. Bullock*, 474 U.S. 376, 388 (1986). Similarly entitled to a presumption of factual correction is a determination that a defendant would have perjured himself if he testified. *Nix v. Whiteside*, 475 U.S. 157, 182 (1986).

By 1992, this Court had held that while mixed questions of law and fact were not entitled to deference, inferences drawn from questions of historical fact were so entitled. *Park v. Raley*, 506 U.S. 20, 35 (1992).

Indeed, after *Marshall*, this Court began to routinely note that there were state factual findings entitled to

[5] This Court used a brief *per curiam* decision at the end of the same term to reiterate the point. *Maggio v. Fulford*, 462 U.S. 111, 113 (1983) (*per curiam*). *Maggio* also held that a determination of competency is entitled to deference. *Id.* at 117. *Accord Demosthenes v. Baal*, 495 U.S. 731, 735 (1990) (same).

deference, with little more than passing reference. *See, e.g., Moran v. Burbine*, 475 U.S. 412, 417 (1986) (state supreme court's recitation of facts of case entitled to deference); *Kuhlman v. Wilson*, 477 U.S. 436, 441 (1986) (same); *Parker v. Dugger*, 498 U.S. 308, 320 (1991) (same). *See Schiro v. Farley*, 510 U.S. 222, 232 (1992) ("Ordinarily on habeas review, we presume the correctness of state court findings of fact").

However, the deference was not unfettered. The question of whether a confession was voluntary remained subject to independent federal determination. *Miller v. Fenton*, 474 U.S. 104, 113, 115, 117 (1985). Likewise, this Court had no hesitation in finding that Florida's procedure for determining competency to be executed was not entitled to deference. *Ford v. Wainwright*, 477 U.S. 399, 411 (1986). Nor did this Court hesitate in determining that a post-trial bail hearing was insufficient to provide a full hearing on a claim. *Kimmelman v. Morrison*, 477 U.S. 365, 388 (1986).

Almost a decade later, this Court determined that the question of whether someone was in custody for *Miranda* warning purposes was a mixed question of law and fact, and not entitled to deference.[6] *Thompson v. Keohone*, 516 U.S. 99, 112 (1995).

Most significantly with respect to the current case, this Court found that even when "directly reviewing" a *Batson*-type[7] allegation, the "credibility of the prosecutor's explanation goes to the heart of the equal protection analysis, and once that has been settled, there seems nothing left to review." *Hernandez v. New York*, 500 U.S. 352, 367 (1991). Additionally, "Whether a prosecutor intended to discriminate on the basis of race in challenging potential jurors is, as *Batson* recognized, a question of historical fact." *Id.* at 367.

In a pre-AEDPA habeas case applying *Batson*, this Court held:

> In habeas proceedings in federal courts, the factual findings of state courts are presumed to be correct, and may be set aside, absent procedural error, only if they are "not fairly supported by the record." 28 U.S.C. § 2254(d)(8).
>
> Here the Court of Appeals did not conclude or even attempt to conclude that the state court's finding of no racial motive was not fairly supported by the record. For its whole focus was upon the *reasonableness* of the asserted nonracial motive (which it thought required by step two) rather than the *genuineness* of the motive. It gave no proper basis for overturning the state court's finding of no racial motive, a finding which turned primarily on an assessment of credibility.

Purkett v. Elem, 514 U.S. 765, 769 (1995) (citations omitted) (emphasis in original). In a post-AEDPA setting, this Court found that the finding of absence of discriminatory intent is a factual one entitled to a presumption of correctness. *Miller-El v. Cockrell*, 537 U.S. 322 (2003) (*Miller-El I*).[8] However, deference does not preclude relief. *Id.* at 340.

B. The Current Federal Habeas Corpus Statute

As this Court knows, in 1996 Congress passed the Antiterrorism and Effective Death Penalty Act (AEDPA). The former section (d) of 28 U.S.C. § 2254 was heavily amended

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[6] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[7] *Batson v. Kentucky*, 476 U.S. 79 (1986).

[8] Last term, this Court found that the presumption of correctness had been overcome. *Miller-El v. Dretke*, 125 S.Ct. 2317, 2340 (2005) (*Miller-El II*). *Miller-El II* will be discussed at length, *infra*.

and became the new subsection (e). Further, a new subsection (d) was added, which provides:

> An application for a writ of habeas corpus on behalf of a person in state custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> (1) resulted in a decision that was contrary to, or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The relevant portion of the 28 U.S.C. § 2254(e)(1) now reads:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

As noted, the former 28 U.S.C. § 2254(d) was amended to remove the eight limitations to the presumption

of correctness for factual issues and severely circumscribed the ability of a federal court to hold an evidentiary hearing on a state claim. *Compare* 28 U.S.C. § 2254(d) (former law) *with* 28 U.S.C. §§ 2254(d)(2) and (e)(1) (current law).

While this new standard is demanding, this Court has not had an opportunity to articulate how it is different from the former statute. However, some of the Circuits have. The Ninth Circuit has agreed with the Seventh Circuit, holding that a key difference between the current habeas corpus law and its predecessor is that the former law seemed to require an evidentiary hearing for a factual finding to be entitled to deference, while the current law does not. *Buckley v. Terhune*, 397 F.3d 1149, 1157 (9th Cir. 2005); *Mendiola v. Schomig*, 224 F.3d 589, 592-93 (7th Cir. 2000). The Fifth Circuit apparently agrees as well. *Valdez v. Cockrell*, 274 F.3d 941, 951 (5th Cir. 2001).

Such inter-circuit unity is not as apparent in addressing how the new 28 U.S.C. § 2254(d)(2) interacts with 28 U.S.C. § 2254(e)(1), however. Three separate approaches have arisen.[9] Unfortunately, the one chosen by the Ninth Circuit frustrates the intent behind the AEDPA and the deference federal law gives to state court proceedings.

The first approach is that taken by the Fifth Circuit in *Valdez*. Under the *Valdez* approach, the district court must evaluate the individual facts for correctness under 28 U.S.C. § 2254(e)(1) and then determine, under 28 U.S.C. § 2254(d)(2), whether the conclusion was reasonable. *Valdez*, 274 F.3d at 951 n.17. *Accord Foster v. Johnson*, 293 F.3d 766, 776 (5th Cir. 2002).

The Ninth Circuit approach is opposite the *Valdez* approach. *Taylor v. Maddox*, 366 F.3d 992 (9th Cir. 2004). Under the *Taylor* approach, the state fact-finding process is reviewed first. Once the process survives that review, only then do the factual determinations enjoy the presumption of correctness. *Id.* at 999-1000.

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[9] A fourth circuit has noted that it has not yet decided whether a petitioner must prevail under both 28 U.S.C. § 2254(d)(2) and 28 U.S.C. § 2254(e)(1) in order to be entitled to relief. *Green v. Travis*, 2005 WL 1581265, n.6 (2nd Cir. July 7, 2005).

In *Taylor*, the Ninth Circuit found that because neither the state judge nor the appellate court weighed the credibility of a third witness at the suppression hearing, and because this witness (an attorney) testified in an apparently credible manner, then state fact-finding process was deficient. *Taylor*, 366 F.3d at 1009-10. *Taylor* also apparently made a determination that a police officer who testified was not credible because he threw away his notes and was not present at all relevant times. *Id.* at 1011-13.[10]

The Third Circuit has taken a middle course. *Lambert v. Blackwell*, 387 F.3d 210 (3rd Cir. 2004). *Lambert* held:

> We therefore read § 2254(d)(2) and § 2254(e)(1) together as addressing two somewhat different inquiries. The fundamental prerequisite to granting the writ on factual grounds is consideration of the evidence relied upon in the state court proceeding. Section 2254(d)(2) mandates the federal habeas court to assess whether the state court's determination was reasonable or unreasonable given that evidence. If the state court's decision based on such a determination is unreasonable in light of the evidence presented in the state court proceeding, habeas relief is warranted.

[10] Because the current case pre-dates *Taylor*, the *Taylor* approach is not cited, although it follows a very similar approach. *See Collins v. Rice*, 365 F.3d 667, 676-77 (9th Cir. 2004) (explaining the standard being followed.

> Within this overarching standard, of course, a petitioner may attack specific factual determinations that were made by the state court and that are subsidiary to the ultimate decision. Here, section 2254(e)(1) comes into play, instructing that the state court's determination must be afforded a presumption of correctness that the petitioner can rebut only by clear and convincing evidence. In this inquiry, a petitioner may develop clear and convincing evidence by way of a hearing in federal court as long as he satisfies the necessary prerequisites. *See* 28 U.S.C. § 2254(e)(2). In the final analysis, however, even if a state court's individual factual determinations are overturned, what factual findings remain to support the state court decision must still be weighed under the overarching standard of section 2254(d)(2).

Id. at 235-36. *Lambert* noted the existence of both *Valdez* and *Taylor*, and held that, depending on the circumstances, 28 U.S.C. § 2254(d)(2) might be addressed first some of the time and 28 U.S.C. § 2254(e)(1) might be addressed first at other times:

> We adopt no rigid approach to habeas review of state fact-finding. In some circumstances, a federal court may wish to consider subsidiary challenges to individual fact-finding in the

> first instance applying the presumption of correctness as instructed by (e)(1). Then, after deciding these challenges, the court will view the record under (d)(2) in light of its subsidiary decisions on the individual challenges. In other instances, a federal court could conclude that even if petitioner prevailed on all of his individual factual challenges notwithstanding the (e)(1) presumption of their correctness, the remaining record might still uphold the state court's decision under the overarching standard of (d)(2). In that event, presumably the (d)(2) inquiry would come first.

Id. at 236, n.19.

The problem with the Ninth Circuit's *Taylor* approach is that it allows a federal court to find the state fact-finding deficient and then give no deference to *any* facts the state court found. Indeed, that is exactly what the Ninth Circuit did as recently as August 1 in an unpublished decision: "Because the district court properly set aside the state court's fact-finding as unreasonable under § 2254(d)(2), § 2254(e)(1)'s presumption of correctness and its clear-and-convincing standard of proof do not come into play." *Garcia v. Runnells*, 2005 WL 1799417, *2 (9th Cir. August 1, 2005).

This, of course, is anathema to the fundamental purposes behind the AEDPA. As Justice Thomas noted recently in his *Miller-El II* dissent, "The passage of time, as AEDPA requires and as this Court has held, counsels in favor of *more* deference, not less." *Miller-El v. Dretke*, 125 S.Ct. 2317, 2351 (2005) (*Miller-El II*) (Thomas, J., dissenting).[11]

[11] Justice Thomas was joined by the Chief Justice and Justice Scalia.

Likewise, Justice Stevens noted in an earlier case:

> [28 U.S.C. § 2254(d)(2)] bolsters our conviction that federal habeas courts must make as the starting point of their analysis the state courts' determinations of fact, including that aspect of a "mixed question" that rests on a finding of fact. AEDPA plainly sought to ensure a level of "deference to the determinations of state courts," provided those determinations did not conflict with federal law or apply federal law in an unreasonable way. H.R. Conf. Rep. No. 104-518, p. 111 (1996). Congress wished to curb delays, to prevent "retrials" on federal habeas, and to give effect to state convictions to the extent possible under law. When federal courts are able to fulfill these goals within the bounds of the law, AEDPA instructs them to do so.

Williams v. Taylor, 529 U.S. 362, 386 (2000) (Stevens, J., concurring).[12] When Justice Stevens' observation is read *in pari materia* with Justice Thomas' views in his *Miller-El II* dissent, then the Ninth Circuit's *Taylor* analysis of the interplay between 28 U.S.C. §§ 2254(d)(2) and (e)(1) cannot withstand judicial scrutiny.

It should be noted that in the one case where this Court has addressed the interplay between §§ 2254(d) and (e)(1), the analysis started with 28 U.S.C. § 2254(e)(1) and then turned to 28 U.S.C. § 2254(d)(2). This Court stated: "The state court's assumption that the records documented

[12] This language is from the main opinion of the Court, but in a section only joined by Justices Souter, Ginsberg, and Breyer.

instances of this abuse has been shown to be incorrect by 'clear and convincing evidence,' 28 U.S.C. § 2254(e)(1), and reflects 'an unreasonable determination of the facts in light of the evidence presented in the State court proceeding,' § 2254(d)(2)." *Wiggins v. Smith*, 539 U.S. 510, 528 (2003).

In contrast, the Ninth Circuit's *Taylor* analysis clearly side-stepped the clear and convincing standard of proof. More significantly, the Ninth Circuit's approach not only undermines the purposes behind the AEDPA, it also effectively undermines the pre-AEDPA line of cases dealing with deference a federal court must give to state court fact-finding—including *LaVallee, Sumner I, Marshall,* and *Hernandez*.

This Court's decisions analyzing 28 U.S.C. § 2254(d)(1) lead to the inexorable conclusion that the Ninth Circuit's approach is wrong. Both 28 U.S.C. §§ 2254 (d)(1) and (d)(2) use the word "unreasonable" as modifiers. Section (d)(1) uses "unreasonable" to modify "application of clearly established Federal law, as determined by the Supreme Court of the United States." Section (d)(2) uses "unreasonable" to modify "determination of the facts of the evidence presented in the State court proceeding."

This Court has held, "The 'unreasonable application' clause requires the state court decision to be more than incorrect or erroneous. The state court's application of clearly established law must be objectively unreasonable." *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003) (*citing Williams*, 529 U.S. at 409).[13]

The *Miller-El I* decision provides additional support for this conclusion. "To secure habeas relief, petitioner must demonstrate that a state court's finding of the absence of purposeful discrimination was incorrect by clear and convincing evidence, 28 U.S.C. § 2254(e)(1), and that the corresponding factual determination was 'objectively

[13] Indeed, *Taylor* itself appears to recognize that the term "unreasonable" has the same meaning in the context of its usage in both 28 U.S.C. §§ 2254(d)(1) and (d)(2). *Taylor*, 366 F.3d at 999. However, *Taylor* ultimately pays little more than lip service to the deference that the AEDPA requires.

unreasonable' in light of the record before the court." *Miller-El I*, 537 U.S. at 348. Interestingly, although *Taylor* had this Court's guidance from *Miller-El I* on how to apply factual findings under the AEDPA, the Ninth Circuit does not cite *Miller-El I*.

Miller-El I can be fairly read to support the proposition that a federal court first analyze the facts pursuant to 28 U.S.C. § 2254(e)(1). The facts that survive this scrutiny then are analyzed pursuant to 28 U.S.C. § 2254(d)(2). The Fifth Circuit clearly follows this approach. The Third Circuit is clearly faithful to this approach. The Ninth Circuit clearly does not follow this approach.

This leads to the current case before this Court. *Miller-El II* left no doubt that a *Batson* claim can definitely succeed in federal habeas corpus given a particularly egregious set of facts.

In *Miller-El II*, this Court articulated the standard it was following in reaching the *Batson* claim, by initially noting that "a defendant may rely on 'all relevant circumstances' to raise an inference of purposeful discrimination." *Miller-El II*, 125 S.Ct. at 2325 (*quoting Batson*, 476 U.S. at 96-97). *Miller-El II* also stated the standard for review as follows:

> Under the Antiterrorism and Effective Death Penalty Act of 1996, Miller-El may obtain relief only by showing the Texas conclusion to be "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 254(d)(2). Thus we presume the Texas court's factual findings to be sound unless Miller-El rebuts the "presumption of correctness by clear and convincing evidence." § 2254(e)(1). The standard is

> demanding but not insatiable; as we said the last time this case was here, "[d]eference does not by definition preclude relief."

Miller-El II, 125 S.Ct. at 2325 (*quoting Miller-El I*, 537 U.S. at 340).[14] In *Miller-El II*, this Court found no coincidence that out of twenty prospective black jurors, ten were struck for cause, nine were struck by peremptory challenge, and only one served. *Id.* This Court also found "more powerful" the evidence showing that the prosecutor treated differently black and white prospective jurors with similar attributes. *Id.* at 2325-26.

Equally significant, the prosecutor's stated reason for striking one black juror was in direct contradiction to that juror's testimony. *Miller-El II*, 125 S.Ct. at 2327. Other explanations seemed similarly implausible. *Id.* at 2327-28; 2329-30. *Miller-El II* also noted:

> It is true that peremptories are often the subjects of instinct, and it can sometimes be hard to say what the reason is. But when illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. A *Batson* challenge does not call for a mere exercise in thinking up any rational basis.

Miller-El II, 125 S.Ct. at 2332 (citation omitted).

The Court looked at other evidence, including the "past practice" of the Dallas County District Attorney, the use of "jury shuffling," and how the prosecution questioned prospective black and white jurors, including the use of a "graphic script." 125 S.Ct. at 2332-37. Finally, the Court found evidence that the prosecution used a 20-year old manual that included listing prospective jurors by race. *Id.* at 2339-40.

This contrasts sharply with what happened in the current case. According to the Ninth Circuit's majority opinion, the majority saw purposeful discrimination in the following factors:

> There is, however, substantial evidence supporting Collins' contention that the prosecutor dismissed Juror 016 because of her race—evidence that the appellate court failed to address. The trial record demonstrates that the prosecutor's justifications for dismissing Juror 016 on the basis of her age were contrary to the record (likely tolerance of drug offenders), were unrelated to her ability to serve as a juror in Collins' case (lack of community ties), and were not applied equally to white jurors (single with no children). The record also shows that one of her justifications was patently discriminatory (gender), while one of her justifications for dismissing Juror 019 was contrary to the record (age). In sum, the record demonstrates that the prosecutor's proffered reasons for dismissing Juror 016 were wholly implausible, unpersuasive, and a pretext for discrimination on the basis of her race.

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[14] This standard also seems antithetical to the Ninth Circuit's *Taylor* standard.

Collins, 366 F.3d at 684-85 (footnote omitted). Additionally, the *Collins* majority found:

> The facts underlying the appellate court's conclusion, namely that the trial court properly accepted the prosecutor's justifications that Juror 016 was young and had exhibited an improper demeanor, are unsupported by the record. Collins's claim of pretext, however, is supported by the record—the record contains clear and convincing evidence that the prosecutor's reasons for striking Jurors 016 and 019 were pretextual. Thus, not only were the state appellate court's factual determinations not supported by the record, but the record also demonstrates that the appellate court's ultimate conclusion that the trial court did not err in finding that Collins failed to establish purposeful discrimination was objectively unreasonable. The fact that the appellate court failed to address all the evidence relating to the prosecutor's justification for striking Juror 016 and indeed disregarded this evidence by stating that "nothing in the present record ... indicates the trial court did not approach its task appropriately" highlights the objective unreasonableness of its assessment of the record. Collins has thus shown by "clear and convincing evidence" that the state appellate court's determination, that the prosecutor did not purposefully discriminate on the basis of race in striking Juror 016, "was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d)(2).

Id. at 685 (footnote omitted).

However, these findings do not stand up to scrutiny, as Judge Hall's able dissent demonstrates:

> Both the trial judge and defense counsel clearly indicated that they understood the prosecutor's justification for striking Juror 019 to be her daughter's drug problem, and the prosecutor's justification for striking Juror 016 to be that, like Juror 006, she was young, single, and potentially tolerant. Under these circumstances, the majority's focus on the prosecutor's misstatement, an issue that was not briefed by the parties, is nothing short of absurd.

Id. at 688-89 (Hall, J., dissenting). Judge Hall further noted:

> The majority also argues that the trial judge should have questioned the prosecutor's credibility because the prosecutor cited a desire to have "more male-female balance" in the jury as a race-neutral basis for excluding Juror 016. The majority places undue emphasis on the prosecutor's arguably improper reference to gender. The prosecutor cited a variety of other race-neutral

> justifications, including Juror 016's demeanor, youth, marital status, and possible tolerance. There is no indication in Supreme Court precedent, or in cases from our circuit for that matter, that a trial judge's decision to reject *one* of the prosecutor's race-neutral justifications compels the trial judge to reject *all* of the other race-neutral justifications offered by that prosecutor. In the instant case, the trial judge rejected the prosecutor's gender-balance justification, but nonetheless chose to credit the prosecutor's other race-neutral justifications for the challenge. The majority highlights nothing in the record to indicate that the California Court of Appeal should have deemed this decision *clearly erroneous.*

Id. at 689 (footnote omitted).

Judge Bea, in his dissent from the denial of rehearing *en banc*, was just as forceful in denouncing the majority's re-weighing of the prosecutor's credibility. "In reversing this determination on the habeas petition, the majority opinion demeans demeanor evidence and nitpicks the record to find that, as a matter of law, the trial judge cannot find the prosecutor credible if there is evidence in the record to support the opposite conclusion. Instead of reviewing the evidence for clear error the majority conducted a de novo review in this case." *Collins*, 365 F.3d at 671 (Bea, J., dissenting from denial of rehearing *en banc*).

The *Collins* majority made two crucial errors, both related to their application of 28 U.S.C. § 2254(e)(1) and § 2254(d)(2). First, although *Taylor* is not cited, the *Collins* majority examines a result it does not like and concludes that

the petitioner is entitled to relief because there was an unreasonable application of the facts.[15] Second, even though the state court fact-finding is clothed in a presumption of correctness—including a state court's determination of a prosecutor's credibility—the *Collins* majority gives little more than lip service to the habeas statute or even this Court's non-habeas corollaries to *Batson*. *See Hernandez*, 500 U.S. at 364 (even on direct review, state court's credibility determination entitled to "great deference").

The California Court of Appeal found that the trial court "was satisfied" that the prosecutor excused Juror 19 because the juror had a family member with drug problems. *Appendix to Petition for Writ of Certiorari 113.* The Court of Appeal further found that the prosecutor had properly used age as a factor in his peremptory challenge for Juror 16 and observed that the trial court was willing to give the prosecutor "the benefit of the doubt" with respect to the explanation that Juror 16 rolled her eyes. *Appendix 115-17.*

Under the Third Circuit's *Lambert* approach, which Amici endorse, Collins has not shown clear-and-convincing evidence to overcome the presumption of correctness 28 U.S.C. § 2254(e)(1) affords state court factual findings. Indeed, there was no federal court hearing to rebut these factual findings at all.

Similarly, there was nothing "objectively unreasonable" in the way the state courts applied the facts in this case. Thus, Collins does not satisfy 28 U.S.C. § 2254(d)(2), either.

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[15] This, of course, is unremarkable, since *Taylor* post-dates *Collins*. However, since Amici are urging this Court to adopt a uniform national standard for applying 28 U.S.C. §§ 2254(d)(2) and (e)(1), the temporal relationship between and *Taylor* and *Collins* is ultimately irrelevant.

CONCLUSION

This Court should take the opportunity to fully address the tension between 28 U.S.C. §§ 2254(d)(2) and (e)(1). Amici urge this Court to adopt an approach similar to that adopted by the Third Circuit because it promotes both comity and federalism between state and federal courts. Congress has shown its respect to both comity and federalism through the enactment of the AEDPA. This Court has shown its respect in the evolution of its habeas corpus decisions. Only the Ninth Circuit has rejected the requirements of the AEDPA and the jurisprudence of this Court to arrive at its own standard of review in federal habeas corpus matters. Because the Court of Appeals used an improper standard in granting Collins habeas corpus relief, its judgment must be reversed.[16]

Respectfully Submitted,

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[16] The State of Texas urges this Court to adopt the Fifth Circuit approach, but otherwise joins this brief in support of the Petitioners.